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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ARTHUR PAUL WASHINGTON, JR.,

Defendant and Appellant.

F058109

(Super. Ct. No. BF124928B)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Colette M. Humphrey, Judge.

Mark Shenfield, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, and Louis M. Vasquez, Deputy Attorney General, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Levy, J., and Hill, J.

INTRODUCTION

On September 19, 2008, an information was filed charging appellant Arthur Paul Washington, Jr. with second degree robbery (Pen. Code, § 212.5, subd. (c), count one),¹ assault with a firearm (§ 245, subd.(a)(2), count two), participating in a criminal street gang (§ 186.22, subd. (a), count three), and resisting a peace officer (§ 148, subd. (a)(1), count four). The information further alleged gang enhancements (§ 186.22, subd. (b)(1), counts one & two) and on-bail enhancements (§ 12022.1, counts one, two & three). Personal gun use enhancements were alleged as to count one (§ 12022.53, subd. (b)) and count three (§ 12022.5, subd. (a)). On April 6, 2009, the information was amended to add count five, an allegation that appellant committed an assault likely to cause great bodily injury (§ 245, subd. (a)(1)), a gang enhancement, and an on-bail enhancement.

On April 6, 2009, appellant waived his constitutional rights and pled no contest to count five. Appellant also admitted the gang and on-bail enhancements. The court granted the People's motion to dismiss the remaining allegations. Under the plea agreement, appellant was to receive a stipulated sentence of 11 years.

On June 17, 2009, the parties modified the original plea agreement. The parties stipulated to an amendment to the information striking the on-bail enhancement and adding a prior prison term enhancement. In exchange for the modification, appellant would receive a stipulated prison term of ten years and another, unrelated action would be dismissed. Appellant admitted the prior prison term enhancement. The court sentenced appellant to a prison term of four years on count five. The court imposed consecutive terms of five years for the gang enhancement and one year for the prison term enhancement for a total prison term of ten years.²

¹ Unless otherwise indicated, all statutory references are to the Penal Code.

² The Legislature amended section 4019, effective January 25, 2010, to provide that any person who is not required to register as a sex offender, and is not being committed to prison for, or has not suffered a prior conviction of, a serious felony as defined in section 1192.7, or a violent felony as defined in section 667.5, subdivision (c), may accrue conduct credit at the rate of four days for every four days of presentence custody.

Appellant obtained a certificate of probable cause and filed a timely notice of appeal. Appellant contends, and respondent concedes, that the abstract of judgment incorrectly characterizes his no contest plea on count five to be an admission that he used a deadly weapon when, in fact, he only admitted committing an assault likely to cause great bodily injury. We agree and will remand for the correction of clerical error in the abstract of judgment.

FACTS

At 5:35 p.m. on September 17, 2008, Nadine Martinez was sitting in her truck parked outside her home. Martinez saw a vehicle with its engine running parked off the road near her home. Appellant and codefendant Kenneth Sims approached Evaristo Garcia who was standing next to a parked vehicle. Appellant pulled a black handgun from his waist, pointed it at Garcia, who was now sitting in the vehicle, and ordered Garcia to open the door. Appellant pointed the gun toward Garcia's midsection and tried to remove something from Garcia.

This court, in its "Order Regarding Penal Code section 4019 Amendment Supplemental Briefing" of February 11, 2010, ordered that in pending appeals in which the appellant is arguably entitled to additional conduct credit under the amendment, we would deem raised, without additional briefing, the contention that prospective-only application of the amendment violates the intent of the Legislature and equal protection principles. We deem these contentions raised here.

We explained in the recent case of *People v. Rodriguez* (March 1, 2010, F057533) __ Cal.App.4th __ [pp. 5-12], however, that the amendment is not presumed to operate retroactively and does not violate equal protection under law. Appellant is, therefore, not entitled to additional conduct credit under the amendment to section 4019. Section 1192.7, subdivision (c)(28), sets forth as a serious felony "any felony offense, which would also constitute a felony violation of Section 186.22." Section 4019, as amended, excludes those convicted of violent or serious felonies from receiving extra presentence custody credits. Appellant's admission of a felony gang enhancement makes his offense a serious felony and he would not qualify for additional presentence custody credits even if *Rodriguez* had held such credits could be applied retroactively.

Garcia told deputies that appellant pointed the barrel of his gun at Garcia's midsection and removed Garcia's wallet from his pants pocket. Sims punched Garcia in the midsection several times. Appellant removed two one dollar bills from the wallet and fled with Sims on foot. Appellant and Sims were later found in a vehicle. While deputies attempted to initiate a traffic stop, appellant and Sims tried to flee on foot but were overtaken and arrested. During the flight, appellant threw something from his waistband. A deputy later found the firearm used for the robbery.

DISCUSSION

When appellant changed his plea, it was with the understanding he would admit the assault allegation with force likely to cause great bodily injury. Appellant did not admit personal use of a weapon. The abstract of judgment, however, states that appellant admitted committing assault with a "deadly weapon other than a firearm." The parties agree that this was clerical error.

Appellate courts have inherent power to correct clerical errors contained in an abstract of judgment that do not accurately reflect the judgment. (*People v. Mitchell* (2001) 26 Cal.4th 181, 188.) The abstract of judgment does not match the terms of the plea bargain and it does not accurately reflect appellant's plea. We will therefore remand for the court to prepare an amended abstract of judgment.

DISPOSITION

The case is remanded to the trial court with instructions to amend the abstract of judgment to reflect that appellant's conviction was for assault with force likely to cause great bodily injury. The trial court shall forward the amended abstract of judgment to the appropriate authorities. The judgment is otherwise affirmed.